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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Marriage of JOSEPH E. AND
KAREN S. BUFORD.

JOSEPH E. BUFORD,

Respondent,

v.

KAREN S. BUFORD,

Appellant.

E062508

(Super.Ct.No. RID210085)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Fernandez,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Law Office of H. William Edgar and H. William Edgar for Appellant.

Law Office of Edmund L. Montgomery and Edmund L. Montgomery for
Respondent.

Respondent, Joseph Buford (Buford), requested that the superior court modify or terminate a spousal support order directing him to pay \$1,725 each month to his former wife, appellant, Karen Starr (formerly Karen Buford) (Starr). (Fam. Code, § 4320.) Buford requested relief because, since the spousal support order, his monthly income from work had declined and then terminated when he took early retirement, his home had declined in value, and his indebtedness had increased. Buford testified he retired at age 57 because his retirement plan allowed it, a rate used to determine benefit amounts was beneficial to him, and he had experienced health troubles that interfered with his ability to work. According to Buford, his retirement benefits, already subject to equalization in the original division of community property (§ 2610, subd. (a)),¹ constitute his only remaining income and they terminate on December 31, 2017. Also, Starr had begun receiving income from Buford's retirement plans and from social security and she would soon qualify for Medicare.

On October 7, 2014, the superior court found "Petitioner elected to retire at age 57 because he was entitled at that age to a full retirement under the rules of his Boeing pension," but rejected the claim he "was required to retire because he is physically unable to work." The superior court found "Petitioner has made the requisite showing that there existed . . . a material changed circumstance" warranting a modification of spousal

¹ Unlabeled statutory citations refer to the Family Code.

support, namely the fact Buford “had already turned into his employer, Boeing, his retirement papers and retired from that company on January 1, 2013.” The superior court also found “a changed circumstance in that, as of October 2014, [Starr] will now qualify for Medicare and thus will have reduced medical expenses.” Based on those findings, the superior court granted Buford’s motion. However, the superior court found good cause not to order the modification to take effect retroactive to the date of the request for modification because “it would be unjust to reduce [Starr’s] spousal support before she became eligible for Medicare.” The superior court ordered that as of “November 1, 2014, spousal support is reduced to \$600 per month” and “[o]n December 31, 2017,” the date Buford’s retirement income terminates, “spousal support shall be reduced to \$0.”

Starr contends the superior court abused its discretion by finding material changed circumstances and terminating spousal support based on Buford’s retirement at age 57 absent evidence that he did not have the capacity to earn income from another job until the standard retirement age.² We conclude the superior court did not abuse its discretion in finding material changed circumstances, but did abuse its discretion in ordering termination of spousal support to coincide with the termination of Buford’s retirement income without considering his earning capacity prior to his reaching the traditional

² Buford does not appeal the superior court’s finding of good cause not to order the modification to take effect until November 1, 2014 and not to terminate spousal support completely until December 31, 2017.

retirement age. Accordingly, we remand for further proceedings consistent with this opinion.

I

FACTUAL BACKGROUND

On July 11, 2007, the Riverside County Superior Court entered a judgment dissolving the 16-year marriage of Buford and Starr. The parties reached a settlement agreement regarding the division of assets and property, which the superior court endorsed.

At the time the original spousal support order issued, Buford worked for the Boeing Company and earned approximately \$6,700 a month in taxable income. Starr did not earn income from work outside the home during the marriage. Buford and Starr owned a house together, which Buford purchased before the marriage. They valued the house at \$395,000 in the settlement agreement.³ The house was then encumbered by a mortgage for \$110,000. Through his work at Boeing and its corporate predecessors, Buford also had accumulated interest in a Fidelity 401(k) deferred compensation plan, a Boeing 401(k) deferred compensation plan, and two Boeing pension plans.

³ At the hearing on his motion to modify spousal support, Buford testified the house was worth approximately \$350,000 at dissolution and appraised at \$400,000 a year after dissolution.

Under the court-endorsed settlement agreement, the superior court ordered Buford, to “pay to [Starr] as and for permanent spousal support the sum of \$1,725.00 per month.” The superior court awarded Buford the marital house, but ordered Buford to make an equalizing payment of \$116,796 to Starr. Buford remained solely responsible for the \$110,000 mortgage. According to Buford, he raised the funds to make the required payment to Starr by refinancing the house. The superior court also awarded to Starr “50% of the community interest in Petitioner’s Boeing 401(k) (Voluntary Investment Plan [VIP]) deferred compensation plan; [¶] . . . 50% of the community interest in Petitioner’s BSS retirement plan pension; [¶] . . . 50% of the community interest [in] Petitioner’s BSS retirement plan for bargained employees pension,” and 50% of the Fidelity 401(k) plan.⁴ Finally, the settlement agreement made Buford solely responsible for \$18,660 in debt to his Boeing 401(k) and to JCPenney.⁵

On December 26, 2012, Buford filed in the superior court a request for an order modifying spousal support from \$1,725 to \$0. Buford supported his request with a declaration stating: “Petitioner’s last day of work was December 21, 2012. . . . Petitioner

⁴ The settlement agreement does not explicitly grant Starr 50% of the Fidelity 401(k) plan. However, it awards Buford only “50% of the community interest in” the plan and Buford testified the Fidelity account, which he identified as an IRA, was also equalized at the time of the dissolution of the marriage.

⁵ The court-endorsed settlement agreement divided other community assets and debts not relevant to this appeal.

will then be retired and will utilize his retirement funds upon which to live. Petitioner . . . will receive retirement benefits for the next 5 years at which time they shall terminate as he has opted for the 5-year period certain benefit. [¶] Therefore, commencing in January 2013, [Buford] will be drawing from his retirement and pension funds.” Buford stated he would “receive approximately \$7,200.00 net per month.” He conceded “[t]his amount is comparable to the amount that he was making at the date of separation,” but pointed out his retirement funds “have already been equalized by the community” and he “will only make this amount for the duration of five (5) years.”

The superior court held a hearing and received evidence related to the factors under section 4320, subdivisions (a) through (n) to determine whether there had been a material change in circumstance since the original spousal support order that warranted reducing or terminating support. Buford testified his monthly income from work had declined from approximately \$6,700 at the time of the spousal support order to approximately \$5,500 before his retirement and to \$0 when he retired at age 57. Buford testified he retired early because he was entitled to do so under the terms of his retirement plan, a rate determining the amount of his benefits was then at its most beneficial to him, and health problems had limited his ability to work in recent years. Buford also testified he chose to receive his retirement benefits on an accelerated schedule—\$9,100 gross (\$6,900 net) a month for five years. Buford testified, “I kept the idea of other employment as a possibility, but to tell the truth, I was fighting bronchitis so much that I

didn't think I would have anymore luck." Buford also testified he is in fine health, but suffers from peripheral neuropathy, high blood pressure, and depression. Other than testimony about his health problems, Buford presented no evidence he lacked or lacks the capacity to continue working to earn additional income.

Buford also testified his assets had decreased and his debts increased since the original spousal support order. He testified the home he received in the division of community property had declined in value from approximately \$350,000 to approximately \$213,000. He also testified his indebtedness on the house increased from \$110,000 to approximately \$374,000. In addition, the order dividing community property left Buford solely responsible for \$18,660 in debts owed to his Boeing 401(k) plan and to JCPenney. At the hearing, Buford testified he now owes \$29,000 on loans from his Boeing 401(k) plan and has "somewhere in the neighborhood of \$29,000" in debt on seven or eight credit cards.⁶ Buford testified, "in the last two years I was working, I was taking time off because of my bronchitis and so I ended up needing money, so I borrowed against my 401(k)s in the last two years." He said he acquired the credit card debit "paying the bills and living, essentially."

According to Buford, he has approximately \$8,098 in expenses a month. Those expenses include \$1,725 in spousal support payments, \$2,000 in credit card payments,

⁶ Buford's Income and Expense Declaration identifies \$30,201 in loans on his 401(k) and \$25,789 in credit card debt.

\$755 toward the 401(k) loan balances,⁷ and approximately \$2,000 in mortgage payments, including taxes and insurance.⁸ Asked “how much money [he] would need per month to provide for the standard of living that [he] experienced during marriage,” Buford testified, “I could probably survive on about what I’m getting for my pension for now. I would need to reduce my debt as much as possible in as short a time as possible which would mean that any excess money I had would go to that.”

The superior court also heard evidence Starr’s income and assets had increased since the original spousal support order. The original support order awarded Starr a monthly support payment of \$1,725, a lump sum equalizing payment of \$116,796, and 50 percent of the community interest in Buford’s retirement benefits. Starr had no income from work at dissolution and had no income from work at the time of the hearing. At the hearing on the modification, Starr testified she received \$469 a month in social security benefits, and in March 2014 began receiving \$729 gross (\$583 net) a month in payments from the equalized retirement accounts. She was also scheduled to receive a \$17,000 gross (\$14,000 net) lump sum pension payment at the end of March 2014.⁹ According to

⁷ Buford’s Income and Expense Declaration specifies monthly loan and credit card payments of \$2,812.35.

⁸ Buford’s Income and Expense Declaration specifies monthly home payments of \$1,925, including mortgage, taxes, and insurance.

⁹ Starr received another lump sum payment of \$10,900 representing monthly payments she had not received from January 2013 to March 2014.

Buford, Starr was required to begin taking pension payments when he started receiving his pension payments. Starr testified she “was forced to take money out” of her Fidelity IRA “to retain an attorney . . . and to live because the spousal support was in arrears.” As a result, the Fidelity IRA has declined in value from approximately \$52,000 in 2012 to \$28,000 at the time of the hearing. Starr also owns a house valued at \$88,000 on which she has a \$13,000 mortgage. Starr testified her monthly expenses are approximately \$2,000, including \$371 a month to cover her mortgage, insurance, and property taxes.¹⁰

Prior to the marriage Starr had worked as a retail sales associate, waitress, and nursery school teacher. However, it is uncontested Starr did not receive income for work outside the home during the marriage. According to Starr, she has not worked outside the home since 1987. She testified she has not recently sought employment because of “my deteriorating health, my age. I will be 65 years old in October, a senior, and I have now gone from using a cane to a quad cane, just recently sustained the injury . . . [a]nd I have the ongoing problems with the multiple sclerosis symptoms.” According to Starr, she has not been diagnosed with multiple sclerosis, but said, “I underwent a lumbar puncture which had high protein content. I have gait problems, vision problems; with multiple sclerosis means multiple plaquing in different parts of your body.” She also testified she suffers from complications from treatment for a nondisplaced fracture in her knee,

¹⁰ Starr’s Income and Expense Declaration identifies \$1,878 in monthly expenses, including \$383 to pay for her mortgage, property taxes, and insurance.

osteoporosis, and anemia. Starr testified she is not able to afford medical insurance. According to Starr, she had not tried to sign up for insurance and subsidies available under the Affordable Care Act,¹¹ but was instead putting off treatment until she qualified for Medicare in October 2014.

Under section 4320, subdivision (a), the superior court found “the parties enjoyed a lower middle class lifestyle during the marriage.” Under section 4320, subdivision (a)(1), the court found “there is insufficient evidence to find that [Starr] can currently support herself at or near the . . . marital standard of living” or “to impute additional income to [Starr].” Under section 4320, subdivision (a)(2), the superior court found Starr “did not work outside of the home during the marriage and the parties’ sole source of income was [Buford’s] employment.”

Under section 4320, subdivision (c), the court noted it “was not persuaded by the testimony of [Buford] on why he chose to retire at age 57 but instead finds that [Buford] elected to retire at age 57 because he was entitled at that age to a full retirement under the rules of his Boeing pension. The court also does not find that [Buford] was required to retire because he is physically unable to work.” The superior court did not otherwise discuss Buford’s earning capacity after retirement.

¹¹ Patient Protection and Affordable Care Act of 2010, 42 United States Code section 18001 et seq.

Under section 4320, subdivision (d), “[t]he court finds that currently [Buford] lives at the standard of living during the marriage. According to his Income and Expense Declaration . . . [Buford] has monthly expenses of \$8,098, which include the spousal support order of \$1,725/mo. [¶] On the other hand, currently [Starr] earns \$469/month in [s]ocial [s]ecurity and \$583/mo. from her share of the Boeing pension. She testified to monthly expenses of \$2,000/mo. She testified that she needed the current spousal support of \$1,725/mo. to pay for her medical bills and prescription expenses and is awaiting her 65th birthday in October 2014 when she will be 65 and qualify for Medicare.”

Under section 4320, subdivision (e), the superior court found Starr “received a lump sum pay-out of \$17,000 and had a balance of \$28,000 from her share of the Fidelity account.”

Under section 4320, subdivision (h), the superior court noted Starr testified “she will be 65 in October 2014 and suffers from knee problems which require her to use a ‘quad’ cane. She also testified to suffering from Osteoporosis, anemia and vision problems. She stated that she has been diagnosed as disabled by her doctor.” The court also noted Buford testified “he was 58 years old and in fair health, suffering from high blood pressure, neuropathy in his feet and from depression. He stated that his health required him to take extended leave from his work in 2011 and 2012 for bronchitis.”

Under section 4320, subdivision (k), the court noted Buford’s “only income is the money he received from the pension which has already been divided . . . [and] his monthly pension payments expire after December 2017.” The court also noted that according to Starr, “she would be in the hole some \$700/mo. because of her uninsured medical expenses without her spousal support. However, in October 2014, upon her 65th birthday, [Starr] should be covered by Medicare.” Based on those facts, the court found “the continuation of the current spousal support order of \$1,725 would cause a greater hardship to [Buford] than the reduction of that amount would cause to [Starr]. However, the court finds the termination of spousal support to [Starr] would cause a greater hardship than the continuation of the obligation to pay spousal support by [Buford].”

Under section 4320, subdivision (n), the catch-all provision, the superior court found Buford “voluntarily took his retirement at age 57” and noted it “was also not persuaded that the Petitioner was somehow forced or coerced by his employer to retire or else lose his position at the company.”¹²

The superior court found Buford “has made the requisite showing that there existed (at the time he filed his RFO on December 26, 2012) a material changed circumstance since the judgment was filed. Specifically, the court finds that [Buford] had already turned into his employer, Boeing, his retirement papers and retired from that

¹² The superior court discussed other factors under section 4320, but they are not relevant to the issues on appeal.

company on January 1, 2013. The court also finds a changed circumstance in that, as of October 2014, [Starr] will now qualify for Medicare and thus will have reduced medical expenses.”

However, the superior court found “good cause to not grant a modification of the spousal support order back to the date of [Buford’s request for modification] because the court finds, after balancing all of the § 4320 factors, that it would be unjust to reduce [Starr’s] spousal support before she became eligible for Medicare in October 2014. Therefore, the court grants the modification of the spousal support order, effective November 1, 2014.” The superior court granted Buford’s request for modification of spousal support and ordered: “Effective November 1, 2014, spousal support is reduced to \$600 per month, payable from [Buford] to [Starr] . . . and continuing each month thereafter until either party’s death, [Starr’s] remarriage, further order of the court, written agreement or December 31, 2017, whichever occurs first. . . . On December 31, 2017, if not terminated earlier by the terms of this order, spousal support shall be reduced to \$0.”

II

DISCUSSION

A. Legal Principles

“Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.]

Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay.' [Citation.]" (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396, as mod. Sept. 2, 2009.) "The moving party bears the burden of establishing a material change of circumstances since the last order." (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 77 (*Stephenson*).) To terminate a support order that contained no express termination date, the supporting spouse must establish "a change in circumstances which justifies termination." (*In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1201.) The supporting spouse also bears the burden of showing any change in circumstances warrants a reduction in the amount of spousal support. (*Stephenson, supra*, at p. 83, fn. 7.)

"The trial court has broad discretion to decide whether to modify a spousal support order. [Citation.]" (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) "[T]he ultimate decision as to amount and duration of spousal support rests within its broad discretion.'" (*In re Marriage of Left* (2012) 208 Cal.App.4th 1137, 1150.) "[A] supporting party's retirement or cessation of gainful employment does not automatically compel a finding of a sufficient changed circumstance to warrant a decrease or termination of a support obligation. Rather, whether modification is warranted is governed by the surrounding circumstances and the trial court's consideration of relevant statutory criteria." (*Stephenson, supra*, 39 Cal.App.4th at pp. 80-81.) "A trial court

considering whether to modify a spousal support order considers the same criteria set forth in Family Code section 4320 as it considered in making the initial order.” (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 247.)

Relevant to this appeal, section 4320 directs the superior court to “consider all of the following circumstances:

“(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

“(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

“(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] . . . [¶]

“(c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living.

“(d) The needs of each party based on the standard of living established during the marriage.

“(e) The obligations and assets, including the separate property, of each party.

[¶] . . . [¶]

“(h) The age and health of the parties. [¶] . . . [¶]

“(k) The balance of the hardships to each party. [¶] . . . [¶]

“(n) Any other factors the court determines are just and equitable.”

We review the superior court’s exercise of discretion in modifying spousal support under ““an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances.’ [Citations.] ““So long as the court exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it.” [Citation.]” (*In re Marriage of Dietz, supra*, 176 Cal.App.4th at p. 398.) ““An abuse of discretion occurs “where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances.” [Citation.]’ [Citation.] We ““must accept as true all evidence tending to establish the correctness of the trial judge’s findings, resolving all conflicts in the evidence in favor of the prevailing party and indulging in all legitimate and reasonable inferences to uphold the judgment.”” [Citation.]” (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898-899 (*Bower*).) The superior court “does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary,

the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support.” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.)

B. The Superior Court Did Not Abuse Its Discretion in Finding a Material Change in Circumstances

Starr contends the trial court abused its discretion when it found a material change of circumstance had occurred based on Buford’s early retirement absent evidence he lacked the ability to earn an income between the age of 57 years and the standard retirement age of 65 years. While we agree Buford’s early retirement does not on its own warrant a finding of material changed circumstances, our review is limited to determining whether the finding of a material change is supported by substantial record evidence. (*Bower, supra*, 96 Cal.App.4th at p. 899.) We conclude it is.

The factors relevant to the decision whether a material change has occurred and a spousal support order should be modified or terminated “include the ability of the supporting party to pay; the needs of each party based on the standard of living established during the marriage; the obligations and assets of each party; and the balance of hardships to each party.” (*Bower, supra*, 96 Cal.App.4th at p. 893.) At bottom, the superior court was required to revisit the financial circumstances of the parties to determine whether they remained able to support themselves at the marital standard of living under the existing spousal support order.

The superior court found Buford “has made the requisite showing that there existed . . . a material changed circumstance since the judgment was filed. Specifically,

the court finds that [Buford] had . . . retired from [Boeing] on January 1, 2013.”

However, Buford’s early retirement does not, standing alone, provide substantial evidence of material changed circumstances. His retirement and loss of income from work is obviously relevant to that determination, but it is not the end of the analysis, especially because he chose to retire eight years before the traditional retirement age of 65. (*Stephenson, supra*, 39 Cal.App.4th at p. 80 [“[A] supporting party’s retirement or cessation of gainful employment does not automatically compel a finding of a sufficient changed circumstance to warrant a decrease or termination of a support obligation”].)

The superior court was required to consider Buford’s capacity to earn. (§ 4320, subd. (c) [“[T]he court shall consider . . . [t]he ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity . . . ”].) However, the superior court rejected Buford’s only evidence—of his health problems—tending to show he lacked earning capacity, finding “[h]e elected to retire at age 57 because he was entitled at that age to a full retirement under the rules of his Boeing pension” not “because he is physically unable to work.” Consequently, the evidence concerning Buford’s early retirement and ability to continue to earn income from work did not provide substantial evidence supporting the superior court’s finding of a material changed circumstance affecting Buford’s ability to continue paying spousal support.

The superior court also found “a changed circumstance in that, as of October 2014, [Starr] will now qualify for Medicare and thus will have reduced medical

expenses.” Starr did testify she would qualify for Medicare benefits beginning in October 2014, but she did not testify doing so would reduce her regular out-of-pocket medical expenses. Instead, Starr testified she did not have health insurance because she could not afford it and she was deferring needed medical treatment until she qualified for Medicare. In addition, her Income and Expense Declaration lists an average of \$60 a month in uninsured health care costs, but in her May 3, 2013 declaration she indicated she expected to have \$120 a month in Medicare expenses once she qualified. Thus, the record supports the conclusion that as of October 2014, Starr expected to gain greater access to medical care, but also that she expected her expenses would *increase*, not decrease. Consequently, the evidence concerning Starr’s acquisition of Medicare coverage did not provide substantial evidence of material changed circumstances affecting Starr’s need for continued spousal support.

We nevertheless conclude there is substantial evidence in the record to support the court’s finding that material changed circumstances occurred. Leaving aside his income from work, the record contains substantial evidence Buford’s financial condition had deteriorated since the original spousal support order. Buford presented evidence his income had declined from \$6,700 to approximately \$5,500 due to time he missed from work on account of bronchitis, and that he incurred substantial debt attempting to make up for the income he lost in that period. Buford also presented evidence his home had decreased in value from \$395,000 to \$213,000 while his mortgage had increased from

\$110,000 to \$374,000 and that he incurred some of the additional mortgage debt in order to make a \$116,796 equalization payment to Starr. Buford testified he receives approximately \$6,900 a month after taxes in pension benefits to pay for approximately \$6,373 in expenses excluding his spousal support payments. However, Buford testified he will receive pension benefits for only five years and he needs any excess funds “to reduce my debt as much as possible in as short a time as possible” before those funds run out. All of this evidence supports the conclusion that Buford’s ability to continue paying under the original spousal support order had diminished enough to reconsider the spousal support order.

The record also contains substantial evidence indicating Starr’s financial condition had improved since the July 7, 2007, spousal support order. When the spousal support order issued, Starr had no source of income and had not worked for approximately 20 years. While the superior court found Starr remained unable to work, it also found she had obtained some ability to cover her own expenses. Starr now receives \$583 per month net (\$729 gross) in payments as her share from Buford’s pensions. She also receives \$469 per month in social security benefits. Together, her pension and social security benefits gave her an income of \$1,052 to pay monthly expenses of approximately \$1,878. While the new income evidently left her with a significant shortfall, it also constituted a substantial increase because she formerly depended entirely on spousal support payments to meet her needs. These sources of income therefore provide substantial support for the

superior court's finding of changed circumstances. (See *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1276 ["The monthly addition of the \$3,700 pension payment is a decrease in [Appellant]'s needs, falling within the definition of a change of circumstances. [Citation.] Thus, the court did not err in finding [Appellant]'s receipt of pension payments was a material change of circumstances"].)

Based on the substantial record evidence of Buford's depressed ability to pay support and Starr's improved ability to meet her needs, we affirm the superior court's finding of material changed circumstances.

C. The Superior Court Abused Its Discretion by Terminating Spousal Support

"A modification of spousal support cannot be granted in the absence of proof of a change in circumstances. However, the converse is not true; a showing of changed circumstances does not necessarily mandate a modification of spousal support." (*In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 10.) Starr contends the court abused its discretion by terminating spousal support absent evidence that Buford did not have the ability to earn income from work. We agree.

There is an important gap in the support for the superior court's conclusion that Buford's support obligations should terminate. Specifically, Buford presented only limited evidence concerning his earning capacity after his early retirement. Section 4320, subdivision (c) requires the court to consider the parties' earning capacity, which is the income a spouse is reasonably *capable of earning* based on his or her age, health,

education, marketable skills, employment history, and the availability of employment opportunities. (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.) It was Buford's responsibility to present such evidence. (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1304 ["[W]here the payor . . . loses his or her job and seeks a reduction in court-ordered support based on the changed circumstances of lack of income, it will be the payor . . . , as moving party, who bears the burden of showing a lack of ability and opportunity to earn income. [Citations.]"].)

Here, Buford did not meet his burden of showing he lacked the ability to earn income and continue paying support. ““Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.” [Citation.]” (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1337-1338.) It is uncontested Buford retired at age 57 after 32 years of employment at Boeing and its predecessor corporations, and that he stopped receiving his salary as of December 31, 2012. However, Buford presented no evidence he was incapable of obtaining a new job. He did not present evidence his skills and training were not well suited for finding employment in the current employment environment. And though Buford did present evidence he had health problems, including bronchitis, peripheral neuropathy, and

depression, which he gave as reasons he chose to retire early, the trial court “was not persuaded by the testimony of [Buford] on why he chose to retire at age 57 but instead finds that [Buford] elected to retire at age 57 because he was entitled at that age to a full retirement under the rules of his Boeing pension. The court also does not find that [Buford] was required to retire because he is physically unable to work.” Thus, the superior court found Buford voluntarily retired early and, at least implicitly, that he was physically capable of continuing to work.

The result of this failure of evidence is the superior court’s conclusion that Buford’s retirement warranted termination of spousal support does not have substantial support. Because there was no evidence that Buford could not obtain a new job to earn income to supplement his retirement income and the court implicitly found that he could do so, it was an abuse of discretion to terminate support. (See *Stephenson, supra*, 39 Cal.App.4th at pp. 82-83.)

Buford contends that under *In re Marriage of Bardzik, supra*, 165 Cal.App.4th 1291, it was Starr’s burden to show that Buford had an ability to earn after he retired and that we should affirm because she failed to present such evidence. We disagree. As the *Bardzik* court explained, that case involved an unusual factual and procedural posture. “The zero-zero support order effectively gave mother the chance to retire without risk of running the gauntlet of [a motion] to modify support in light of that change of circumstances. . . . [H]ad there not been a zero-zero [support] order, and mother retired

and initiated a reduction of her share of support, the dynamics would have been different: Mother would have been in the more conventional situation of a payor parent who experiences a reduction in income and . . . it would have been *her* burden to establish a lack of ability and opportunity to earn. That dynamic might have prompted her to think twice about retiring quite so early.” (*Id.* at p. 1308.) Buford stood in precisely the conventional situation the *Bardzik* court describes, so he bore the burden of presenting evidence respecting his ability to continue earning.

Buford contends he was not required to submit evidence related to his earning capacity because there was no evidence he retired early in order to escape his support obligations. However, it makes no difference why Buford elected to retire early. As the Court of Appeal held in *Stephenson*, “the nature of the cessation of employment, be it retirement, quitting or layoff, or whether voluntary or involuntary in character, is irrelevant when it comes to the trial court’s duty to consider statutory criteria before determining support obligations. For, a spouse’s obligation to continue support is predicated upon the enumerated statutory criteria including reasonable earning capacity under the circumstances, regardless whether there is evidence of deliberate avoidance of support obligations.” (*Stephenson, supra*, 39 Cal.App.4th at p. 74.) Instead, what matters is that Buford retired early and decided not to seek additional work.

Consequently, to justify a termination or reduction in spousal support, he should have brought forward evidence his earning capacity was diminished, and the parties’ relative

ability to support themselves justified terminating or reducing support. Buford did not present such evidence, and no other record evidence provides substantial support for the superior court's order reducing and then terminating the original spousal support order.

Buford contends we should affirm the superior court order terminating spousal support because Starr invited the court's error by failing to "raise the issue that [Buford] took an early retirement for the sole purpose of avoiding his spousal support obligation." We disagree. First, as we have discussed, it is irrelevant whether Buford retired early for the purpose of evading his support obligations. (*Stephenson, supra*, 39 Cal.App.4th at pp. 74, 79-80.) Thus, Starr did not invite error by failing to raise that point. Second, "[u]nder the doctrine of invited error, a party may not object to the sufficiency of the evidence to support a finding against him when the lack is the result of improper exclusion of evidence at his own instance. [Citations.] A party who has prevented proof of a fact by his erroneous objection will not be permitted to take advantage of his own wrong, and a reviewing court will assume that the fact was duly proved." (*Watenpaugh v. State Teachers' Retirement System* (1959) 51 Cal.2d 675, 680.) Here there is no suggestion Starr acted to prevent the submission of evidence concerning Buford's reasons for taking early retirement or, more to the point, evidence of his earning capacity between the ages of 57 and 65 years old. Nor is there any suggestion Starr otherwise took steps to induce the trial court into its erroneous ruling. Responsibility for the lack of evidence on this point falls on Buford.

D. The Superior Court Abused Its Discretion by Reducing Spousal Support

We similarly find no substantial evidence to support the superior court's decision to reduce spousal support from \$1,725 to \$600 a month from November 1, 2014 to December 31, 2017. Even if the evidence discussed in part II.B., *ante*, establishes Buford has experienced a serious decline in his financial condition, it is not possible to come to an informed conclusion about the degree to which the decline affected his ability to make payments under the original spousal support order. If Buford is capable of replacing his entire former salary by acquiring a new position, his ability to pay spousal support may be completely unaffected. If, on the other hand, he can replace only a portion of his former income, a reduction in spousal support may be warranted. These are issues appropriately decided in the first instance by the superior court after a hearing on remand.

The superior court's decision to reduce spousal support to \$600 after Starr qualified for Medicare suffers from an additional defect. As we discussed *ante*, the superior court concluded against the evidence that qualifying for Medicare would reduce Starr's regular expenditures. The evidence shows qualifying for Medicare will increase Starr's access to medical care, but may actually increase her medical expenditures. Thus, the determination that Starr needed \$600 to make up for the shortfall left after pension and social security payments was an abuse of discretion. On remand, the parties may introduce evidence related to whether Starr has qualified for Medicare and the effect doing so has had on her actual expenses.

III

DISPOSITION

We reverse and remand for further proceedings. On remand the superior court shall hold a new evidentiary hearing at which both sides may introduce evidence of Buford's earning capacity, the status of Starr's enrollment in Medicare and any associated costs and savings, and update evidence concerning any other relevant factor under section 4320.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.